SUPREME COURT, U. S.

Supreme Court, U.S.
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No. 968 2

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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JOSEPH S. BUKOWSKI,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Joseph S. Bukowski, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated September 15, 1970, is not yet reported, but is printed in the Appendix to this Petition (Appendix "A"). (Appendix "B" is the order of the Court of Appeals denying rehearing.)

## JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1970 (Appendix A). Petition for Rehearing was denied by order on October 15, 1970 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. May a sentence of three years' imprisonment (even as modified to eighteen months) be imposed for alleged "serious" contempt of a federal court out of the presence of the court, without presentment or indictment by a grand jury?

2. (a) Where a prosecution for contempt of court out of the presence of the court, involves a juror's alleged violation of a court's order not to read about, watch television about, or listen to radio about a pending case, but that if some such thing should occur the juror is to report that fact to the court, is not such a prosecution estopped by the provisions of the Fifth Amendment to the Constitution of the United States forbidding self-incrimination?

(b) Is not the admission of evidence of failure to incriminate one's self an impermissible violation of the petitioner's rights under the Fifth Amendment?

3. Did the trial judge err in denying the petitioner's repeated motions to recuse himself?

(a) May a judge preside over a jury trial for alleged "serious" contempt of court, in which he passed upon the

complaint and signed and issued the "Rule to Show Cause", and in effect, acted as a one-man grand jury?

(b) May a judge preside over a jury trial for alleged "serious" contempt outside the court's presence when he informs the jury that he issued and signed the "Rule to Show Cause" and the charges contained therein?

4. Did the government sustain its burden of proving the petitioner guilty beyond any reasonable doubt, i.e., may a conviction stand based solely on one witness' uncorrobated testimony of unsworn out-of-court statements purportedly made by the petitioner?

5. Did the rule to show cause adequately advise the respondent of the nature and cause of the charge as required by the Sixth Amendment?

6. Did the Petitioner receive the fair trial by jury to which he is entitled?

(a) Was not the communication of the title of the charge "Rule to Show Cause" to the jury by the judge, a comment on the petitioner's silence and a shifting by the Court of the burden of proof to require the Petitioner to adduce evidence to the effect that he was innocent of the charges?

(b) Was the Court's demeaning of petitioner's counsel in the presence of the jury so prejudicial as to require reversal?

(c) Did the trial court erroneously exclude lawful evidence on behalf of the petitioner?

(d) Were the statements of the prosecutor in final argument prejudicial error?

7. Did the Court err in instructing the jury?

(a) Did the Court violate Rule 30 of the Federal Rules of Criminal Procedure by instructing the

jury differently on the elements of the offense than the Court had informed the parties it would, and should not such a violation require reversal?

(b) Did the Court err in refusing to instruct on a theory of defense?

8. Did the Court err in refusing to suppress evidence obtained by abuse of the Grand Jury process and in violation of legal ethics?

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

"§ 1, T.18, U.S.C. Offenses classified

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

"§ 401, T.18, U.S.C. Power of Court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

"§ 402, T.18, U.S.C. Contempts constituting crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted

for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

"§ 1504, T.18, U.S.C. Influencing juror by writing

Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury."

"§ 3691, T.18, U.S.C. Jury trial of criminal contempts

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order,

rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

**Federal Rules of Criminal Procedure**

"Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * * "

"Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform

counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

"Rule 42. Criminal Contempt

(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

## STATEMENT OF THE CASE

This case began on December 29, 1967, when the United States filed a Notice and Petition For Rule To Show Cause why Joseph S. Bukowski should not be held in criminal contempt for allegedly violating Judge Julius Hoffman's "orders" regarding reading and discussing matters concerning the trial in the cause of *United States* v. *Durovic*, et al, No. 66 CR 668, which trial Judge Hoffman presided at and Joseph S. Bukowski served as a juror. (S.R. *2, A. 14)

On December 29, 1967, Judge Hoffman issued the Rule to Show Cause directed to Joseph S. Bukowski. Subsequently, the petitioner appeared, and by counsel, filed motions to discharge the rule to show cause (S.R. 3, R. 10, A. 20, 39), to suppress evidence as being obtained by abuse of the grand jury (S.R. 5, R. 11, A. 25, 47); that Julius J. Hoffman disqualify himself (S.R. 6, A. 27); and that D. Arthur Connelly be disqualified as a prosecutor (R. 9, A. 39). All of these motions were denied except that the Court did strike certain paragraphs of the rule to show cause (R. 20, 24, Tr. 3-17, A. 49, 59).

Later, the petitioner filed motions that Julius J. Hoffman recuse himself (R. 39, A. 51), for disclosure of evidence derived from electronic eavesdropping (R. 46, A. 53), and that the Court designate whether the cause is a serious or non-serious offense (R. 49, A. 54), and also filed a supplemental motion to discharge the rule to show cause (R. 52, A. 54).

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* "S.R." refers to the Short Record on Appeal filed in conjunction with the Respondent-Appellant's Emergency Application for Bail Pending Appeal. "R." will refer to the Original Record on Appeal and "Tr." will refer to the transcripts of proceedings. "A" will refer to the Appendix.

On January 7, 1969, the Court denied the motion to recuse and denied the motion to discharge and designated the cause to be a serious offense (R. 63, A. 56).

A jury was selected, and the cause went to trial on January 9, 1969 (R. 67-68, A. 56). Throughout the trial, the petitioner made numerous objections and motion for mistrial which were denied (R. 72, 73, 76, A. 57). The petitioner moved for acquittal at the close of the government's case and at the close of all evidence. Both motions were denied. (R. 73, 77, A. 57).

The petitioner objected to the Court's charge to the jury as being different than the Court had announced prior to final arguments. The objection was denied (R. 78, A. 58).

On Janusry 16, 1969, the sealed verdict was opened finding the petitioner guilty (R. 80, A. 58). The petitioner was then sentenced to three (3) years imprisonment although he had no prior record of any kind and was denied bail pending appeal (S.R. 9, A. 30). The petitioner remained in custody fifteen (15) days until the Court of Appeals granted bail on January 31, 1969. (R. 83, 84, A. 58)

Appeal was taken to the United States Court of Appeals for the Seventh Circuit. That Court affirmed the conviction by opinion issued September 15, 1970, App. A. Rehearing was denied by order entered October 15, 1970, App. B.

## THE EVIDENCE

During the voir dire of the jury, the Court informed the prospective jurors of some of the issues in the case of *United States* v. *Durovic* and also informed the jurors that

he had presided at that trial. The Court then informed the jurors that he had signed the charges brought against the petitioner in this cause (Tr. 2-5, A. 59-63).

RAYMOND DICKOW testified that he was the managing editor of the Butcher Workman Magazine, and that Government Exhibits 1, 2, 7 and 8 were copies of that magazine (Tr. 6-7, A. 62-63).

BRYANT KLISYZZEK testified that he was a member of the jury in the trial of *United States* v. *Durovic*, et al. (Tr. 11-12, A. 65-66). He stated he remembered the cover of Government Exhibit 1 which was red, white and blue, and saw it in the jury room during the trial. He did not read it, did not know how it got there, did not see it in anyone's possession, and did not know what happened to it (Tr. 66-67, A. 79).

WALTER J. STACHNIK testified that he is Secretary-Treasurer of the Beef Cutters and Sausage Makers Union 100, and on October 2, 1965 he was an officer in charge of a convention held at the Holiday Inn East at Springfield, Illinois (Tr. 16, A. 66).

He stated he was custodian of certain records which were admitted into evidence over objection and purported to be receipts showing attendance at a dinner at the convention and receipt for gifts. He did not know who made out the papers or where they were made out (Tr. 18-32, A. 67-69).

He did not see the name "Joseph Bukowski" on the exhibits (Tr. 29, A. 68). The other part of the exhibit was minutes of the meetings but it did not show who attended and did not show when the film on Krebiozen was shown, where, or who attended (Tr. 32, A. 69). He did not attend the movie.

**LEONARD NOWICKI** testified that he was vice president of Local 43 of the Amalgamated Meat Cutter and Butcher Workmen, and that he was at the convention held in Springfield, Illinois on October 2 and 3, 1965 as a delegate.

He stated he has known Bukowski since 1939, and he saw Bukowski in the lobby of the Holiday Inn about 4:00 P.M. and later again in the evening (Tr. 33-36, A. 69).

On cross-examination, Nowicki stated that Bukowski was not a delegate and that he had met Bukowski in the lobby at about 4:00 P.M. (Tr. 39, A. 70). The movie about Krebiozen was being shown at that time elsewhere (Tr. 42, A. 71).

Nowicki said he saw Bukowski in the lobby again about dinner time with a woman and then again between 11 and 12 in the bar (Tr. 40, A. 71).

Nowicki said that he attended the dinner, but did not see Bukowski (Tr. 41, A. 71).

**LYCIE BROOKS** testified that he is the general manager of the Holiday Inn East and identified Government's Exhibit 3 as the bill of a man registered in Room 453 on October 2, 1965 (Tr. 43-45, A. 71). The exhibit was admitted in evidence.

**ROBERT H. COLLINS** testified that he was a reporter for the St. Louis Post-Dispatch and stated he interviewed Joseph Bukowski on May 4, 1966 (Tr. 54-55, A. 76).

Collins testified that Bukowski stated that it was fortunate that some members of the jury knew what was going on and that he knew Patrick Gorman, the International Secretary-Treasurer of the Butcher Workmen Union, and that he had seen him while the trial was in progress and

had spoken to him about an article in the Butcher Workman magazine (Tr. 57, A. 76).

Collins further testified that Bukowski stated he had read articles in the Butcher Workman concerning Krebiozen during the trial and that he had discussed one of the articles with Adolph Beranek, the foreman of the jury (Tr. 58-60, A. 77-78). Collins further testified that Bukowski said he did not report these items to the court, that he didn't think it was necessary (Tr. 60, A. 78).

LOIS CLARK testified that she was a juror in the trial of *United States* v. *Durovic*, and thought she remembered seeing a picture that appeared in the Butcher Workman during the trial. She was not sure. She didn't know how it got there or what happened to it. There were many magazines and books in the jury room. She did not report any of this to the court (Tr. 68-72, A. 79-81).

EUGENE BISSELL testified that he is a deputy U. S. Marshal and was in charge of the jury during the trial of *United States* v. *Durovic*. He stated no one reported magazines or articles to him (Tr. 72-77, A. 81-82).

The prosecutor then read from the transcript of the trial of *United States* v. *Durovic* that certain persons including Joseph S. Bukowski were chosen and sworn as jurors in that case (Tr. 90-91, A. 84).

The prosecutor further read from the transcript quoting Judge Hoffman's "orders" regarding publicity (Tr. 92-101, A. 85-90).

The prosecutor then read from the transcript that Joseph S. Bukowski had informed Judge Hoffman that he was an official of two unions (Tr. 102, A. 91).

The prosecutor then read a portion of Government's Exhibit 1 being an article by Dr. Ivy, a defendant in *United States* v. *Durovic* (Tr. 103, A. 91).

The government rested and the petitioner moved for acquittal. The motion was denied. (Tr. 104-108, A. 92)

EMILY WARRINGTON testified that she is a waitress in Springfield and that on October 2, 1965, she met Joseph Bukowski at the Holiday Inn East Motel at about 4 in the afternoon (Tr. 114, A. 93-94).

They went to the bar and had a few drinks. They stayed there until 6:30 or 6:45 when she left. She then returned about 9:00 P.M. and met Mr. Bukowski, and they went to a place and had a few more drinks until about 11:00 P.M. About 11:00 P.M., they returned to the Holiday Inn and went to the Coffee Shop where they ate. She then left. She returned the next day about 4:00 P.M., when she picked up Mr. Bukowski at the Motel and took him to his train (Tr. 115-117, A. 94).

ADOLPH BERANEK testified that he was a foreman of the jury in *United States* v. *Durovic*, and that the first time he saw the magazine (Gov. Ex. 1, 2, 7 and 8) was before the Grand Jury.

He did not see them in the jury room, nor did he discuss any articles concerning Krebiozen with Mr. Bukowski during the trial of *United States* v. *Durovic* (Tr. 119-121, A. 94-95).

On cross-examination, he stated he had attended a dinner attended by some of the defendants in *United States* v. *Durovic*, after the trial, and that Mr. Bukowski was also there (Tr. 123, A. 95).

He also stated he had said to Robert Collins that he had cheated a little in the jury room (Tr. 124, A. 95).

PORTER DAVIS testified that he was an alternate juror in the case of *United States* v. *Durovic*, and that he had never seen the magazines (Gov. Ex. 1, 2, 7 and 8)

before. He did not recall seeing any magazines in the jury room (Tr. 128-131, A. 96).

The Court refused to allow Mr. Davis to answer whether or not he ever discussed any articles with Mr. Bukowski during the trial (Tr. 132, A. 96-97).

The Court sustained the government's objections and either refused testimony or struck testimony by Howard Mosher and Shirley Appling as to the reputation of Joseph Bukowski in the community in which he works for honesty, integrity, and as a law-abiding citizen (Tr. 132-142; A. 96-102).

**STEFANIE WISNIEWSKI** testified that Joseph Bukowski's reputation for honesty and integrity and as a law-abiding citizen in the community in which he lives is very good (Tr. 142-146, A. 102).

**THOMAS F. STRUBBE** testified that he is Chief Deputy Clerk of the United States Court of Appeals for the Seventh Circuit and has custody of official transcripts filed with that Court (Tr. 147-148, A. 102-103).

He identified Defendant's Exhibit 1 as a volume of transcript of trial before Judge Hoffman in *United States* v. *Amabile*, et al, No. 67 CR 86 (Tr. 148-150, A. 103).

The Court sustained the government's objection to admission of the transcript (Tr. 150-151, A. 103).

On offer of proof, the petitioner offered that if the exhibit were admitted and a portion of pages 113 through 114 were read, it would demonstrate that Judge Hoffman considered his "orders" regarding publicity that he gives to jurors as being "mere directions", and that therefore these "orders" are not valid orders on which to base contempt. (Tr. 152-153, A. 104).

The Court sustained the government's objection to the offer of proof (Tr. 153, A. 105).

Miss Lavin read from part of the transcript of the case of *United States* v. *Durovic* where Judge Hoffman charged the jury, and where he admitted that they may have seen or observed some publicity but charged them to decide the case solely on the evidence (Tr. 156-159, A. 106-107).

The time being 3:15 in the afternoon, and the respondent having at that time exhausted his witnesses, the Court was requested to continue the cause to the next day. The Court then belittled petitioner's counsel and accused them of delaying the trial in front of the jury (Tr. 160-161, A. 107-108).

A subsequent motion for mistrial was denied (Tr. 163-164, A. 108-109).

Motion to reinstate the reputation testimony that was stricken, were denied (Tr. 164-165, A. 109).

DOROTHY DRUST testified that she was a member of the jury in *United States* v. *Durovic*, and that she had never seen the magazines or articles with Mr. Bukowski, nor did she hear him discuss them with anyone else on the jury (Tr. 165-168, A. 109-110).

VYRLE JOHNSON testified that she was an alternate juror in *United States* v. *Durovic*, and that she had never seen the magazines before, nor had she discussed them or heard them being discussed by Mr. Bukowski or anyone else (Tr. 170-172, A. 110-111).

She stated that she had taken a Spanish book into the jury room (Tr. 173, A. 111).

Miss Lavin read from Gov. Exhibit 2 that "the developers of Krebiozen seek no more than a fair test—" (Tr. 174, A. 111).

The defense rests.

The petitioner's motion for acquittal was denied (Tr. 211, A. 113).

The Court charged the jury differently than it had informed the parties, but overruled the objections made (Tr. 285-306, 308-309, A. 116-131).

The petitioner was found guilty and sentenced to three years' imprisonment although he had no prior record, and on the Court's own motion, the defendant was denied bail pending appeal and incarcerated for 15 days until released by the Court of Appeals (Tr. 2-5, A. 131-134).

The Court of Appeals affirmed the conviction on September 15, 1970, while modifying the sentence to 18 months (App. A).

Rehearing was denied by order entered October 15, 1970 (App. B).

## REASONS FOR GRANTING THE WRIT

### I.

### A SENTENCE OF THREE YEARS' IMPRISONMENT (EVEN AS REDUCED BY THE COURT OF APPEALS TO EIGHTEEN MONTHS) MAY NOT BE IMPOSED WITHOUT PRESENTMENT OR INDICTMENT BY A GRAND JURY.

It is submitted that a sentence of three years' imprisonment (even as reduced by the Court of Appeals to eighteen months, App. 26) may not be imposed without presentment or indictment by the Grand Jury, and thus the imposition of the sentence in this case violates the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution in pertinent part reads:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *"

The trial court designated the Rule to Show Cause incorporating the Petition for the Rule which charged a criminal contempt outside the presence of the court, constituted a "serious offense" (R. 63, A. 56), as that term has been used by this Court in *Bloom* v. *Illinois*, 391 U.S. 194. In so doing, submission to the grand jury for the purpose of securing an indictment was mandatory:

> "Its [indictment or presentment of a grand jury] adoption in our Constitution as *the sole method for preferring charges in serious criminal cases* shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362 (emphasis supplied)

Also see *Stirone* v. *United States*, 361 U.S. 212, 215; *United States* v. *Consolidated Laundries*, S.D.N.Y. 159 F.Supp. 860, 866.

It should be noted that a motion to dismiss the Rule to Show Cause as not informing of the nature and cause of the accusation in violation of the Sixth Amendment to the Constitution of the United States and without indictment in violation of the Fifth Amendment to the Constitution of the United States, pended before the district court for a period of approximately three months before being denied (R. 52, 63, A. 54, 56).

The Court of Appeals, in affirming the petitioner's conviction, relied upon this Court's holding in *Green* v. *United States*, 356 U.S. 165, 183-187, wherein it was held that criminal contempts need not be prosecuted by indictment and tried before a jury.

However, this holding has been overruled since: In this Court's holdings in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380, and *Bloom* v. *Illinois*, 391 U.S. 194, the Court specifically held that serious criminal contempts must be tried before a jury both in federal and state courts. (It might be noted that the only question raised in *Cheff* was the necessity of a jury trial, and the requirements of grand jury indictments have never been extended to the states under the Fifth Amendment, and thus that question was not present in *Bloom*.)

Justice Black, in his dissent in *Green* v. *United States*, 356 U.S. 165, 194, 195, stated:

> "I would hold that the defendants here were entitled to be tried by a jury *after indictment by a grand jury* and in full accordance with all the procedural safeguards required by the Constitution for 'all criminal prosecutions'." (Emphasis supplied.)

It is argued that Justice Black's dissent was adopted in *Cheff* v. *Schnackenberg*, 384 U.S. 373 and *Bloom* v. *Illinois*, 391 U.S. 194, as far as it applied.

It might be noted that in *Bloom* v. *Illinois*, 391 U.S. 194 at 201, this Court held,

> "Criminal contempt is a crime in the ordinary sense.
>
> • • •
>
> "Given that criminal contempt is a crime in every fundamental respect, • • •"

Thus, the conclusion to be reached is that since criminal contempt is a crime, then prosecutions for "serious" criminal contempts in federal courts (as is the case here), must be prosecuted in the same manner as all other federal crimes. And, when the criminal contempt is "serious" and receives a penalty of in excess of one year,[1] then such "serious" criminal contempt is equivalent to a felony under the provisions of 18 U.S.C. 1 and must, by the provisions of the Fifth Amendment, be prosecuted only "on a presentment or indictment of a Grand jury".

## II.

## THE CONVICTION IS INVALID AND UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH AMENDMENT, SINCE THE PETITIONER WAS CHARGED AND CONVICTED OF FAILING TO INFORM THE COURT THAT HE VIOLATED ITS ORDER.

The charge of criminal contempt in this case is contained in the Notice And Petition For Rule To Show

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[1] The petitioner was sentenced in a federal court to three (3) years' imprisonment (S.R. 9, A. 30). The sentence was modified by the Court of Appeals to eighteen (18) months (App. A, p. 26), but is still in excess of one (1) year.

Cause. Paragraphs 2 and 3 of that Petition state as follows:

> "2. On April 28, 1965, and on various dates thereafter during the course of the trial, until January 31, 1966, all of the petit jurors, including Joseph S. Bukowski, who had been duly sworn to act as jurors in Case Number 64 CR 668, were ordered and directed by the Court, as follows:
>
> > ". . . it is my responsibility as a matter of law to direct and order each and every one of you . . . not to talk with anybody about it, not to permit anybody to speak with you about it, not to read any newspapers or magazines, not to listen to radio or to look at or listen to television programs . . . if you should inadvertently be exposed to publicity concerning any aspect of this case, I direct and order you not to discuss such exposure with any other prospective jurors or veniremen, or actual juror . . . but rather I direct and order you to report the matter to me as soon as possible."
>
> 3. On April 29, 1965, on *voir dire* examination, the Court, with reference to inadvertent exposure to publicity concerning any aspect of the case, stated:
>
> > "If by such inadvertence some matter connected with this case comes to your attention if you are chosen to serve here, from an outside source during the trial, will you immediately inform the Court of it? If you will not, please raise your hand . . . I take it you will from your omission to raise your hand." (S.R. 2, A. 14-15)

The charging paragraphs, which petitioner was tried and convicted of violating, were paragraphs 9, 12, 14, 16 and 18 of the Petition. Those paragraphs charged as follows:

> "9. The respondent Joseph S. Bukowski, as a member of a union affiliated with the Amalgamated

Meat Cutters and Butcher Workmen of North America, was on the mailing list together with 360,000 persons that received said magazine. The said Joseph S. Bukowski did willfully and knowingly violate the orders and directions of this Court, in that:

(a) He read the articles appearing in the July-August issue of said magazine;

(b) He discussed said articles with other members of the jury;

(c) He brought a copy of said magazine into the jury room and brought copies of reprints of said article into the jury room;

(d) He failed to bring the matter to the attention of the Court.

• • •

12. The respondent Joseph S. Bukowski received a copy of the October 1965 issue of "The Butcher Workman" and did willfully and knowingly violate the orders and directions of this Court, in that:

(a) He read the articles appearing in said issue;

(b) He discussed said articles with other members of the jury;

(c) He brought a copy of said magazine into the jury room; and brought said page 14 of said issue into the jury room;

(d) He failed to bring the matter to the attention of the Court.

• • •

14. The respondent Joseph S. Bukowski did willfully and knowingly violate the orders of this Court, in that:

(a) He attended a convention at which a proponent of Krebiozen was scheduled to appear and speak;

(b) He discussed the proceedings with other jurors;

(c) He failed to bring this matter to the attention of the Court.

• • •

16. The respondent Joseph S. Bukowski received a copy of the November-December issue of "The Butcher Workman," and did willfully and knowingly violate the orders and directions of this Court, in that:

(a) He read the article appearing in said issue;

(b) He discussed said article with other members of the jury;

(c) He failed to bring the matter to the attention of the Court.

• • •

18. The respondent Joseph S. Bukowski received a copy of the January 1966 issue of "The Butcher Workman" and did willfully and knowingly violate the orders and directions of this Court, in that:

(a) He read the article appearing in said issue;

(b) He discussed said article with other members of the jury;

(c) He failed to bring the matter to the attention of the Court." (S.R. 2, A. 16-19)

It is clear that the petitioner was ordered by the Court not to do certain things, but that if he did do those things in violation of the order, he was then ordered to report this to the Court, or in other words, incriminate himself.

The Fifth Amendment to the Constitution states in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

This Court, in *Bloom* v. *Illinois*, 391 U.S. 194 at 201, held that "Criminal contempt is a crime in the ordinary sense, . . .".

Thus, to paraphrase this Court: Given that criminal contempt is a crime in every fundamental respect, the question is whether the Fifth Amendment prohibitions against self-incrimination must apply. This Court has held that those provisions do apply to criminal contempt proceedings (*Bloom* v. *Illinois*, 391 U.S. 194, 204).

It is thus suggested that the petitioner was put in the same dilemma by the orders in this case as the persons subject to the gambling registration laws or gun registration laws were, in the cases of *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85.

At no time in this case has the petitioner surrendered or waived his rights under the Fifth Amendment prohibition against self-incrimination.

It might also be noted that more than just charging the petitioner with failure to report certain acts to the Court, evidence of the failure to report was actually introduced in evidence (Tr. 72-77, A. 81-82).

It is argued that the admission of this testimony was no less a comment on the petitioner's exercise of his rights under the Fifth Amendment not to be a witness against himself, than the conduct condemned by this Court in *Chapman* v. *California*, 386 U.S. 18, and *Griffin* v. *California*, 380 U.S. 609. Also, specifically note this Court's holding as expressed in footnote 37 in *Miranda* v. *Arizona*, 384 U.S. 436, 468 to the effect that it is impermissible to penalize an individual for exercising his Fifth Amendment privilege.

It should be noted that at no time has the petitioner given up his rights and that he did not testify in the trial court. It is thus argued that the petitioner's conviction must be set aside because it was obtained in violation of the petitioner's right not to incriminate himself.

## III.

## THE COURT ERRED IN REFUSING TO RECUSE ITSELF.

It is a fundamental requirement of due process that before a man suffer the loss of his liberty, he be given a fair trial in a fair tribunal.

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." (*Re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S. Ct. 623)

And as the Supreme Court said in *Offutt* v. *United States*, 348 U.S. 11, 14, 99 L.Ed. 11, 16, 75 S. Ct. 11:

> "* * * justice must satisfy the appearance of justice."

It is argued that the refusal of the trial judge to recuse himself and transfer this case to another as he was twice moved to do (S.R. 6, 7, A. 27, 29), not only denied the "appearance of justice" to this cause, but in actuality denied Joseph Bukowski the fair trial in a fair tribunal to which he was entitled under the Fifth and Sixth Amendments to the Constitution of the United States.

Joseph Bukowski was brought to trial on charges of criminal contempt for matters allegedly occurring while he was a juror in a trial (*United States* v. *Durovic, et al.*,

64 Cir 668), which lasted over nine months and which was presided over by Judge Hoffman, the same judge who presided in the trial of the case at bar. The charges which brought Joseph Bukowski to trial were signed by Judge Hoffman and this fact was communicated to the jury in this cause by Judge Hoffman (Tr. 5, A. 61-62).

Judge Hoffman's interest and bias in the case of *United States* v. *Durovic, et al.*, is well demonstrated by an article which appeared in Time Magazine of October 24, 1969, at page 75:

> "* * * He also presided over the nine-month fraud trial of the promoters who had marketed Krebiozen as an anticancer drug. To this day, Hoffman is puzzled at the jury's verdict of acquittal. 'If I had been trying that case without a jury,' he says, 'I would have found the defendants guilty right off. *I don't know what went wrong.*'" [Emphasis added.]

This bias certainly removed any appearance of justice from the proceedings in this case.

But, Joseph Bukowski complains about more than the mere denial of the appearance of fairness and justice. It is argued that Joseph Bukowski was actually denied the fair and unbiased trial to which he was entitled.

Further, the trial court's prejudice is well demonstrated by the three years' sentence of imprisonment and denial of bail pending appeal without basis in law or reason. Joseph Bukowski is an ordinary good citizen who had no prior criminal record of any kind (Tr. 4, A. 133). The trial court's prejudice and conviction that this was a case of personal affront to the trial judge is well demonstrated in the trial judge's remarks in denying Joseph Bukowski bail pending appeal:

> "This man has flaunted the dignity, the authority, the *majesty* of the Federal Court * * *." (Tr. A. 133) (Emphasis added);

and in the trial court's written findings denying bail pending appeal where the trial court found that Joseph Bukowski presented a threat to the community. (S.R. 10, A. 30).

It is argued that Judge Hoffman's signing of the charges against Joseph Bukowski, was in effect an act of a one-man grand jury. His then presiding over the trial of Joseph Bukowski after telling the jury that

> ". . . I signed the document, the petition which makes the chages against the respondent in this case . . . (Tr. 5, A. 61)

destroyed any appearance of justice or fairness. (*Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623; *Re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499; *Offutt* v. *United States*, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11).

Implicit in a fair trial is that the accuser must not preside over the trial. Judge Hoffman, the trial judge, signed the rule to show cause in this case, thus finding substance in the information or complaint filed by the United States Attorney, obviously based in part upon the knowledge imparted to him and upon knowledge he had acquired during the original trial. He became the accuser in the eyes of the jury. Many cases have held that the delicate balance of fairness and justice can be destroyed by remarks and questions by the Judge. *United States* v. *Levi*, 177 F.2d 833, 836, states:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 153 U.S. 614, 626, 14 S.Ct. 919, 38 L.Ed. 841, and jurors are ever watchful of the words which fall from him. 'The Judge occupies a position of great influence with the jury in conducting a trial; * * * he should be careful not * * * to say anything which might

have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts.' Virginian Ry. Co. v. Armentrout, 4 Cir., 166 F.2d 400, 405."

How much greater, then, was the influence of Judge Hoffman upon the jury in the case at bar under the procedure complained of, when Judge Hoffman told the jury that he had signed the rule to show cause when he read it to the jury on voir dire, immediately after they were placed in the box.

> "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." (*Re Murchison*, 349 U.S. 133, 137, 99 L.Ed. 942, 947, 75 S.Ct. 623)

The conviction of Joseph S. Bukowski must be reversed.

## IV.

## THE GOVERNMENT DID NOT SUSTAIN ITS BURDEN OF PROVING JOSEPH S. BUKOWSKI GUILTY BEYOND ANY REASONABLE DOUBT.

The only evidence presented by the government which tended to support the charges against Joseph S. Bukowski was the testimony of Robert Collins, a reporter for the St. Louis Post-Dispatch newspaper to certain statements that he said Joseph Bukowski made during an interview.

Collins testified that Bukowski stated that he had read articles in the Butcher Workman magazine concerning Krebiozen during the pendency of the trial of *United States* v. *Durovic*, and that he discussed these articles with members of the jury, and in particular with the foreman Adolph Beranek (Tr. 54-60, A. 76-78).

These statements were allegedly made only to Collins, and there is no corroboration of them.

In fact, Collins' testimony is contradicted by both government and defense witnesses.

Bryant Klisyzzek and Lois Clark, two members of the jury in the trial of *United States* v. *Durovic*, were called to testify by the government. Klisyzzek stated he recognized the red, white and blue cover of Government's Exhibit 1 which was a copy of the Butcher Workman Magazine for July, 1965. However, he did not state that he recognized nor remembered the name of the magazine. He further stated he never saw anyone with the magazine and he did not read it or discuss it (Tr. 66-67, A. 79).

Mrs. Clark testified that she thought she might have seen a picture on page 14 of Government's Exhibit 2 during the trial, but she was not sure. However, she was sure she never read the magazine nor did she discuss any articles with Bukowski or anyone else (Tr. 68-72, A. 79-81).

Collins' testimony was clearly uncorroborated. But even further, the petitioner called other members of the jury from the trial of *United States* v. *Durovic*, whose testimony conflicts with Collins'.

Adolph Beranek testified that he was foreman of the jury in the case of *United States* v. *Durovic*, and that he never saw any of the magazines making up Government exhibits 1, 2, 7 and 8 during the trial of *United States* v. *Durovic*, and he further stated that he never discussed any articles concerning Krebiozen with Joseph Bukowski during that trial (Tr. 119-127, A. 94-96).

Further, Porter Davis (Tr. 128-132, A. 96-97), Dorothy Drust (Tr. 166-169, A. 110), and Vyrle Johnson (Tr. 170-173, A. 110-111), also members of the jury in *United States* v. *Durovic*, were called by the petitioner and they each testified that they had never seen the magazines, nor did

they have any discussions, nor did they overhear any discussions concerning articles about Krebiozen during the trial.

Collins' testimony was certainly uncorroborated and unsubstantiated. It was insufficient to prove the charges contained in paragraphs 9, 12, 16 and 18 of the petition attached to the rule to show cause (S.R. 2, A. 14-20) alleging Joseph Bukowski read and discussed articles with other jurors.

The United States Supreme Court in *Wong Sun* v. *United States*, 371 U.S. 471, 488, 489, 9 L.Ed. 2d 441, 456, 83 S.Ct. 407 wrote:

> "One line of our decisions establishes that criminal confessions and admissions of guilt require extrinsic corroboration; * * *
>
> "It is settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. We observed in Smith v. United States, 348 U.S. 147, 153, 75 S.Ct. 194, 197, 99 L.Ed. 192, that the requirement of corroboration is rooted in 'a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused'."

The Court wrote in *United States* v. *Echeles*, 7 Cir., 222 F.2d 144:

> "A conviction cannot rest upon a confession unless it is corroborated by evidence establishing the *corpus delicti*."

There was one other charge in the rule to show cause which alleged that Joseph Bukowski attended a convention in Springfield and was present at a movie about Krebiozen and a dinner where a resolution favorable to Krebiozen

was introduced during the trial of *United States* v. *Durovic* (Paragraph 14, Petition for Rule to Show Cause, S.R. 2, A. 18).

However, the government's evidence was a long way from proof beyond a reasonable doubt.

The government's witnesses and exhibits at best showed that Joseph Bukowski was in Springfield during the convention. However, the government's own witnesses and exhibits showed that Joseph Bukowski was not an elected delegate and would have no reason to attend the meetings of the convention (Tr. 39, A. 70), that he was not present at the movie on Krebiozen (Tr. 39, 42, A. 70, 71), and that he was not at the dinner where the resolution was introduced (Tr. 41, A. 71). Further, the testimony of Emily Warrington (Tr. 113-118, A. 93-94) called by the petitioner showed that Bukowski was away from the site of the convention most of the time.

The government's proof of the charges contained in paragraph 14 fell far short of proof beyond a reasonable doubt.

Because the government failed to prove the charges alleged in paragraphs 9, 12, 14, 16 and 18 (all of the charges) of the Petition for Rule to Show Cause beyond a reasonable doubt, the conviction of Joseph S. Bukowski must be reversed.

## V.

## THE RULE TO SHOW CAUSE DID NOT ADEQUATELY ADVISE THE PETITIONER OF THE NATURE AND CAUSE OF THE ACCUSATION AS REQUIRED BY THE SIXTH AMENDMENT.

The complete failure to inform of the nature and cause of the accusation against him is fatal to the so-called conviction.

There is no pattern of order of statutes providing a reasonable definition of punishable misconduct, which can be recognized as such by one subject to the statutes, and assuredly there is such confusion in the provisions for punishment that the prosecutor and judge in the case at bar greatly enlarged the nature or grade of the alleged offense from one punishable by a sentence of imprisonment of not more than 6 months to one in which a sentence of three years was imposed.

If the conduct contended for by the government as having occurred, did occur, then the conduct consisted of a violation of a specific statute proscribing the specific misconduct and which provides for a punishment by imprisonment of no more than 6 months. Under Section 1, T.18 U.S.C., such an offense is a petty offense which does not require presentment or indictment by a grand jury. The same section provides that any offense punishable by more than one year imprisonment shall be a felony. A felony charge requires presentment or indictment by a grand jury under the Fifth Amendment to the Constitution. Section 1504, T.18 U.S.C.A. provides that one who attempts to influence the action or decision of a jury of which he is a member by sending any written communication to any juror, shall be fined not more than a thousand dollars or imprisoned not more than six months, or both.

The confusing hodgepodge of statutory and rule-made attempts to punish "contempt" of court, (F.R.Cr.P. 42; Section 401, 402, 3691 T.18, U.S.C.), made the grade of offense confusing to the prosecutor, the judge and the petitioner in this case, and demonstrates that no constitutional provision adequate to inform the petitioner of the nature of the accusation against him and of the grade of offense and punishment which he faces upon conviction exists. The respondent respectfully urges that considera-

tion of the constitutional provisions, the statutes and the Federal Rules of Criminal Procedure involved, make it impossible to determine the nature and cause of accusation as required constitutionally, in a purported contempt charge such as the one at bar.

Since the punishment was not by any standard, but by whim of the judge, no defendant could intelligently plead to the accusation.

In any event, this proceeding is void and unconstitutional.

The paramount importance of recognition of the grade of the offense of which he is accused, to a defendant, is clear from *Cartwright* v. *United States*, 146 F.2d 133, 135. *United States* v. *Gordon*, 253 F.2d 177, was decided *en banc* by the Seventh Circuit Court of Appeals in 1958. Briefly, it held that a defendant should not be expected to plead to a count without knowing whether it charges a felony or misdemeanor, and failure to make it clear in the charge what the grade of offense is, renders the charge invalid, 253 F.2d 177 at 179, 180, 181.

## VI.

## THE COURT'S AND PROSECUTOR'S CONDUCT, AND THE COURT'S ERRONEOUS RULINGS, DENIED THE RESPONDENT A FAIR TRIAL.

### A. The Communication of the Title of the Charge Was an Impermissible Shifting of the Burden of Proof and Comment on the Petitioner's Silence.

The communication of the title of the charge "Rule To Show Cause" to the jury by the judge (Tr. 5, A. 62), was an impermissible shifting of the burden of proof. The title in and of itself leads one to believe that the petitioner

must adduce evidence, or in other words, show cause why he should not be held in contempt. This violates the Fifth Amendment and has denied the Petitioner the fair trial to which he is entitled.

**B. The Court Demeaned the Petitioner's Counsel in the Presence of the Jury.**

On the morning of January 13, 1969, the government rested its case. That afternoon at 2:00 P.M., the petitioner began presenting evidence. After calling seven witnesses and presenting some legal arguments, the petitioner was temporarily out of witnesses and informed the court that the testimony had gone faster than anticipated and requested the cause be continued to the next day. It was then approximately 3:15 P.M. The following then occurred:

> "The Court: Now this is the second time, Miss Lavin.
>
> "Miss Lavin: I tried to get my out-of-town witnesses in for today, though I had advised them that tomorrow looked like the time schedule.
>
> "The Court: There is a jury of 14 here ready to serve, members of my staff—I can't do this. You did the same thing yesterday.
>
> "Miss Lavin: No, sir.
>
> "The Court: It is your duty to have your witnesses here.
>
> "Miss Lavin: I couldn't do the same thing yesterday.
>
> "The Court: Last Friday.
>
> "Miss Lavin: No, no, sir, that was the government Friday who ran out of witnesses.
>
> "The Court: Well, there was one day when you didn't have your witnesses.
>
> "Miss Lavin: It couldn't have been, sir.
>
> "The Court: I don't think I can run a courtroom that way, but since it is the Respondent that asks, I

will grant your motion if your motion is to continue this case until tomorrow morning.

"Miss Lavin: It is, your Honor.

"The Court: I will allow it.

"Miss Lavin: Thank you." (Tr. 160-161, A. 107-108)

The Court then addressed the jury in a sarcastic tone of voice and said:

> "You heard counsel for the Respondent indicate that the respondent is not ready to go ahead. Ladies and gentlemen of the jury, in order to be fair to the respondent, I have granted the request for a continuance." (Tr. 161, A. 108)

The petitioner moved for a mistrial which was denied (Tr. 163-164, A. 108-109).

This attack by the Court on the petitioner's counsel could have no other effect but to prejudice the jury against the petitioner. The attack was particularly uncalled for in view of the fact that twice before continuances had been allowed the government, when the timing of witnesses had been off, without comment (Tr. 51-52, 77-78, A. 74-75, 82-83).

> "It is of course also a fundamental principle that the trial judge in his conduct of the trial should be fair and impartial to both the Government and to the defendants, and should not by * * * unwarranted criticism of counsel indicate to the jury what he thought their verdict should be." (*Krogmann* v. *United States*, 6 Cir., 225 F.2d 220, 229).

Also see *United States* v. *Ah Kee Eng*, 2 Cir., 241 F.2d 157, 161.

This action of the trial judge when considered with the rest of the trial, requires reversal.

**C. The Court Erroneously Excluded Lawful Evidence on Behalf of the Petitioner.**

The petitioner called Howard Mosher (Tr. 132-135, A. 96-98) and Shirley Appling (Tr. 135-142, A. 98-102) to testify concerning the petitioner's good reputation for honesty, integrity and as a law-abiding citizen in the community where he works. This testimony was excluded by the Court without reason on the objection of the government.

That such testimony is proper is unquestionable. (*Michelson* v. *United States*, 335 U.S. 469, 93 L.Ed. 168.)

The Court further excluded the petitioner's evidence which demonstrated that the trial judge himself did not consider his direction to abstain from news media, etc., an "order", but considered it "merely a direction" (Tr. 152-154, A. 104-105) which by definition means "no more than a guideline". (*Random House Dictionary of the English Language, The Unabridged Edition, Copyright 1966.)*

Such an "order" could not be a lawful order of which one could be in contempt. (Also see point VII.)

By keeping this evidence of reputation and of the invalidity of the "order", the trial court denied the petitioner his right to defend and therefore the conviction must be reversed.

**D. The Court Erred in Allowing Prejudicial Argument by the Prosecutor.**

In final argument, the prosecutor said in part:

> "Ladies and gentlemen, in today's complex society where time-honored things are being abused and maligned and disrespected, where our fellow citizens are marching down the streets of Chicago carrying the black flag of tryanny and the red flag of communism — " (Tr. 254-255, A. 115)

The Court overruled the objection to this vituperative attack not based in evidence on the petitioner (Tr. 255, A. 115). Its only purpose could be to arouse passion and prejudice.

In reversing a conviction for mail fraud for the errors in the conduct of the trial, the United States Court of Appeals for the Eighth Circuit, in discussing the misconduct of the prosecutor in his final argument to the jury on matters not in evidence, said in *Beck* v. *United States*, 33 F.2d 107, at Page 114:

> "* * * A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions."

The Court went on to quote from a Supreme Court of the United States case and said:

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The State, whose interest it is the duty of court and counsel to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. * * * "

In the case at bar, the Court erred in overruling the objection. At the very minimum, the prosecutor should

have been reprimanded. However, as the Court in *United States* v. *Burgos*, 2 Cir., 304 F.2d 177, at Page 178 said:

> "It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case.
>
> " * * * Arguments such as those made in the prosecutor's summation should be beneath the dignity of a representative of the government of the United States as they are incompatible with the proper administration of criminal justice. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)."

The obvious attempt by the prosecutor in the case at bar to inflame and prejudice the jury to make up for the government's failure in proof of material and essential elements, requires that the judgment of conviction be reversed.

## VII.

## THE COURT ERRED IN INSTRUCTING THE JURY.

### A. By Its Violation of Rule 30 of the Federal Rules of Criminal Procedure in That It Instructed the Jury Other Than the Court Had Informed the Parties It Would.

Rule 30 of the Federal Rules of Criminal Procedure provides, so far as it is pertinent here, that:

> "The Court shall inform counsel of its proposed action upon the request [for instructions] prior to their argument to the jury. . . . "

The obvious purpose of the rule is that it allows the parties to conform their respective arguments to the instructions to be given. It is equally obvious that argument at odds with the instructions is, in effect, no argument at all. No more flagrant violation of that rule could have been en-

countered than that in this case where the Court advised the parties that it would charge in one manner, and, after argument devised to conform to the instructions the parties were advised would be given, charged in absolutely diametrically opposite fashion. The whole purpose of the rule was subverted.

The petitioner was denied effective assistance of counsel on closing argument, undoubtedly one of the most important phases of a criminal trial.

Even more offensive than ordinary subversion of the general rule is the fact that the failure to comply with the rule concerned the most important of instructions — the elements necessary to conviction.

This concerns the government's proposed instruction 7A which read as follows:

> "In order to convict the respondent, Joseph S. Bukowski, of the criminal contempt charged in the Notice and Petition for Rule to Show Cause, 67 CR 728, the Government must prove beyond a reasonable doubt:
>
> "1) that Joseph S. Bukowski was a member of the jury in *United States of America v. Durovic, et al.*, 64 CR 668;
>
> "2) that as such a member of the jury, he was ordered and directed by the Court as follows:
>
> > ' . . . it is my responsibility as a matter of law to direct and order each and every one of you . . . not to talk with anybody about it, not to read any newspapers or magazines, not to listen to radio or to look at or listen to television programs . . . if you should inadvertently be exposed to publicity concerning any aspect of this case, I direct and order you not to discuss such exposure with any other prospective jurors or veniremen,

or actual juror . . . but rather I direct and order you to report the matter to me as soon as possible.'

and

"If by such inadvertence some matter connected with this case comes to your attention if you are chosen to serve here, from an outside source during the trial, will you immediately inform the Court of it? If you will not, please raise your hand . . . I take it you will from your omission to raise your hand.'

"3) that he received a copy of the July-August 1965, *or* the October 1965, *or* the November-December 1965, *or* the January 1966 issue or issues of *The Butcher Workman* magazine and failed to bring to the attention of the Court the receipt of said copy or copies of *The Butcher Workman*.

"4) that each of the above issues contained a written article, relating to Krebiozen, a matter connected with the case in which he was a juror, and that:

"a) he read such article or articles, *or*

"b) he discussed said article or articles with other members of the jury, *or*

"c) he brought a copy of one or more of said magazines or a copy of a reprint of one or more of said article or articles into the jury room, and

"d) he failed to bring the matter to the attention of the Court,

"5) that he attended a convention at which a proponent of Krebiozen appeared and spoke and that he *either:*

"a) discussed the proceedings of that convention with other members of the jury, *or*

"b) failed to bring to the attention of the Court his attendance at said convention." (Government's Instruction 7A, Emphasis Supplied)

The emphasis above given the disjunctives purports the source of the objections made. There was no doubt of the parties' understanding of what the Court's intention of how it would charge on the requests was going to be. In the course of the discussion and objection the following colloquy occurred.

"Miss Lavin: In the fourth line of the second paragraph, I object to the disjunctive being used.

"The Court: You mean 'or acts'?

"Miss Lavin: Act or acts, and again it appears in the sixth line.

"The Court: What do you say to that objection, Mr. McDonnell?

"Mr. McDonnell: We charge that if Mr. Bukowski — *if the jury determines beyond a reasonable doubt that Mr. Bukowski did any of the acts charged in the rule to show cause* or failed to do the act of informing the marshal, we think that this is the contempt of court, and we believe that as the next instruction, government's 7-A, will show, *the acts should be in the disjunctive;* that *any* one of the acts charged or the *one* failure to act as charged would constitute a contempt.

"Miss Lavin: May I respond?

"The Court: Yes.

"Miss Lavin: It was the ruling of this court that the allegations of the rule to show cause, if proved, constituted a serious offense. I submit to the court that under those circumstances the entire petition for the rule to show cause constituted the offense and proof is necessary on every element set forth therein.

* * *

"The Court: I think I will give this in substance over objection. I am referring to government 7.

"There has been a government's 8 that has been handed up.

"I beg your pardon. Do you want to be heard on 7-A?

"Miss Lavin: Yes, sir.

"Paragraph 2, I object to reviewing the government's evidence. I object that the evidence as presented is not set forth. If you are allowed to review it in this manner — it is not set forth in its entirety; and I object to the disjunctives in paragraph 3. The sub-paragraphs in 4 are also in the disjunctive. I object to that because it is an amendment of the charge upon which Mr. Bukowski was brought to trial.

"The Court: Mr. McDonnell.

"Mr. McDonnell: I might say that the disjunctives in this instruction are very similar to disjunctives used in narcotics charges where they charge that he did receiver [sic] or sell or —

"The Court: A narcotics expert would make that analogy.

"Mr. McDonnell: Where he did receive or conceal or buy or sell or facilitate the transportation, concealment or sale of heroin.

"The Court: Why did you not include in Request 7-A, Mr. McDonnell, the asserted attendance at the union convention and the discussion of its proceedings with other jurors?

"I don't think you have that included in 7-A.

"Mr. McDonnell: I am looking at it. I see that would be 14 on the rule to show cause. I must apologize. This was inadvertently left out. Mr. Connelly and I were working Friday night on this and it is left out. It is inadvertent. I apologize to the Court. It should be included.

"The Court: Are you loading that one onto him?

"Mr. McDonnell: I think I will load it onto him, Judge, rather than take it myself.

"The Court: Since I am not going to charge the jury today, it is all right.

"I might tell you parenthetically we have a special meeting of all of the judges of the court at three and I have some specially set matters at two here that will require me to recess this case until tomorrow morning.

"You may withdraw or revise No 7-A." (Tr. 183-186, A. 112, Emphasis Supplied)

There was no doubt in the minds of either party that the court was going to instruct that if any of the several matters charged in the Rule to Show Cause had been proved, it would support a finding of guilty. Witness the argument of the prosecutor in closing:

> "Ladies and gentlemen, we believe that the government has proven the respondent Mr. Bukowski guilty beyond a reasonable doubt and we say, ladies and gentlemen, if anything we allege in the contempt order has been proven to your satisfaction beyond a reasonable doubt, that he did any of the named things in that order, then your verdict must be guilty because the government has the burden of proving the defendant guilty of any one of those things—that he talked to somebody, that he read an article, that he did not tell the marshal about the article, that he went to Springfield where Mrs. Friedman talked on krebiozen.
>
> • • •
>
> "Ladies and gentlemen, I will not go into all the admonitions and orders of the court again. I just want to tell you again that if the government has proven to your satisfaction beyond a reasonable doubt that Mr. Bukowski did any one of these charges or allegations in the contempt order, it is your duty to find him guilty and I submit to you, ladies and gentlemen, that not only have we proven one or more but I believe that we have proven all of the allegations. But if you find that he did one of them, that is enough, and his Honor will so instruct you." (Tr. 239-40, 259)

The prosecutor thus was clearly aware that his job was an easy one. Equally aware was the defense that its job was herculean. Equally aware under the advises as were given by the court, it would charge the jury that *any* of the several matters charged in the Rule to Show Cause

would be sufficient to support conviction. Thus began the laborious argument on behalf of the defendant addressed to each and every charge of the Rule to Show Cause and the labored effort to overcome them *ad seriatim*. (Tr. 260-277)

Having completely divested the defense of the forceful argument it would be entitled to if its objection to instructing in the disjunctive, as opposed to the conjunctive, had been sustained, lo-and-behold, after articulating the objection to the instruction, and having been told that the instruction if tendered would be given "in substance," the disjunctive was not in fact used. This was *after* argument—after laborious painstaking argument, when emphasis on any of the several allegations of the Order to Show Cause would have completely defeated the Government's charge against this defendant-appellant in the eyes of the jury.

The instruction given was as follows:

> "The respondent is being tried on the charges contained in the petition for rule to show cause. That document charges the respondent with the offense of contempt of court. The respondent is on trial only for the offense charged in the petition for rule to show cause and you must decide whether the government has proven that he is guilty beyond a reasonable doubt of that offense only and of no other offense.
>
> "The petition for rule to show cause, as I have mentioned, has already been summarized to you early in the trial. I remind you that the petition charges:
>
> "1. That Joseph S. Bukowski was a member of the jury in the case of United States of America v. Durovic and others, 64 CR 668. Those latter figures are the number of the case in the court.

"2. That as such a member of the jury, he was ordered and directed by the court during the course of the trial as follows:

> "'It is my responsibility as a matter of law to direct and order each and every one of you not to talk with anybody about it, not to permit anybody to speak with you about it, not to read any newspapers or magazines, not to listen to radio or look at or listen to television programs. If you should inadvertently be exposed to publicity concerning any aspect of this case, I direct and order you not to discuss such exposure with any other prospective jurors or veniremen or actual jurors, but, rather, I direct and order you to report the matter to me as soon as possible. And if by such inadvertence some matter connected with this case comes to your attention if you are chosen to serve here from an outside source during the trial, will you immediately inform the court of it? If you will not, please raise your hand.
>
> "'I take it you will from your omission to raise your hand.'

"3. That he, the respondent, received a copy or copies of one or more of the following issues of The Butcher Workman Magazine: July-August, 1965, October 1965, November-December, 1965, January 1966.

"4. That each of these issues contained a written article favorable to the drug krebiozen with which the case in which he was serving as a juror was concerned, and that he knowingly and wilfully violated the orders and directions of the court in that (a) he read such article or articles; (b) he discussed such article or articles with other members of the jury; (c) he brought a copy of one or more of the magazines containing the articles or a copy of a reprint of one or more of such articles into the jury room; (d) he failed to bring the matter to the attention of the court.

"5. That he knowingly and wilfully violated the court's orders and directions in that he attended a convention at which a proponent of the drug krebiozen was scheduled to appear and speak; that he discussed the proceedings with other jurors; that he failed to bring the matter to the attention of the court.

"These allegations contained in the petition charge a violation of a federal statute." (Tr. 299-302; A. 125-127)

Immediately upon the conclusion of the instruction the defense objected as follows:

"The defense objects to the elements instruction as given by the court. That was government's 7A, . . .

"As I understood the instruction when your Honor was giving it, the disjunctive was no longer the manner in which your Honor instructed the jury. I therefore object that your Honor did not tell the defense before argument that you were going to use the conjunctive so that the argument could be directed in accordance with the instruction as given.

"The Court: The objections of the defendant, Mr. Clerk, to the charge to the jury as stated by Miss Lavin will be overruled." (Tr. 308-309, A. 131)

The Court will note that in resisting a motion for bail in the Court of Appeals (after the lower court held this man without bail as a "menace to the community"), the prosecutor considered our contention on this point as a possible basis for appeal without substance in that the instruction given was more lenient than we were told would be given, thereby recognizing that a more forceful and direct argument could have been given on elements obviously not proved. (This is especially so since the Court overruled the Motion for Judgment of Acquittal because most of the allegations depended for proof on out of court statements not corroborated).

The practice employed here by the trial judge is so at variance with principles of fair play that few cases are reported on the subject. However, in *Loveless* v. *United States*, C.A.D.C., 260 F. 2d 487, the court decried the practice and reversed and remanded for a new trial. As in *Terminal Railroad Association of St. Louis* v. *Staengel*, 8 Cir., 122 F. 2d 271, the concurring opinion recognized the possibility, as occurred here, of the deception of counsel (122 F.2d at 278).

This was so obviously a violation of the law, and a deprivation of petitioner's right to effective assistance of counsel, that it alone requires reversal.

**B. The Court Erred in Refusing To Instruct on a Theory of Defense.**

At this point the petitioner had been burdened with the onus of arguing disproof, or want of proof, as to each of the several charges of the Rule to Show Cause, and was advised that the court would advise the jury that proof of *any* of those charges would support conviction. Added to this was the testimony of the witness Bissell that the jury in *United States* v. *Durovic, et al.*, was instructed to read *nothing at all* during the nine month duration of that trial.

Another defense theory was that as a matter of human experience such a restriction for such a length of time was contrary to the moral order; that human beings could not lawfully be put under such a prohibition, that a like infringement on liberty and the right to know would be violative of the civil rights of even a hardened convicted criminal of the most despicable order. It, (the defense), felt that such an order could properly be submitted to a jury for determination of its lawfulness in the light of human experience, and finding such restriction unlawful (as we

submit, they would be obliged to do), the entire charge, predicated as it was on the existence of a lawful order, must fail. It, therefore, proposed the following instruction:

> "It is the theory of the Respondent that the words spoken by Judge Hoffman to the jurors in the case of *United States* v. *Durovic, et al.*, did not constitute a lawful order, and, therefore, the Respondent could not be guilty of contempt. If the jury finds that those words did not constitute a lawful order of the Court, the jury must find the Respondent not guilty." (Defendant's Instruction 9)

The Court—out of hand and without awaiting any protest by the plaintiff—refused the instruction:

> "The Court: Do you want the jury to pass on a question of law? I told you that if you bring in a book, I will be delighted. You would save me many an unpleasant hour. Your No. 9 I would refuse at this time, but if you bring in the book, the right book, I will give it. How can they determine whether my order was lawful or not.
>
> • • •
>
> "The Court: We will refuse No. 9. You can take it back." (Tr. 212)

It is beyond cavil that the defense is entitled to an instruction on any theory of defense that may be founded in the record. This theory was well founded in the record and corroborated by the experience brought into the courtroom by the jurors.

> "If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. *Bryan* v. *United States*, 5 Cir., 1967, 373 F. 2d 403. The judge must, therefore, be

> cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense." *Strauss* v. *United States*, 5 Cir., 376 F. 2d 416, 419.

See also *Salley* v. *United States*, C.A.D.C., 353 F. 2d 897, 899.

## VIII.

## THE COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE OBTAINED BY ABUSE OF THE GRAND JURY PROCESS IN VIOLATION OF LEGAL ETHICS.

The government obtained the evidence in the case at bar by use of Grand Jury subpoenas and having witnesses testify before the Grand Jury. No indictment was returned, and it is the contention of the petitioner that no indictment was intended to be returned. It is suggested that this use of the Grand Jury is an abuse which should not be tolerated by the Federal Courts.

It is also suggested that attempting to transfer an alleged abuse of 18 U.S.C. 1504 into a felony without action of the grand jury was improper.

The respondent also suggests that the canons of ethics of all bar associations prohibit contacting of jurors by the prosecutors or defense attorneys. It is suggested that the questioning of the jurors by the prosecutor was unethical and should have been prohibited.

This Court has held that the use of grand jury process without intending to obtain indictments "would be flouting the policy of the law." (*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683, 2 L.Ed. 2d 1077, 1082). Also see

*United States* v. *Proctor & Gamble Co.*, D.C., N.J., 175 F. Supp. 198; *In re National Window Glass Workers*, 287 F. 219; and *In Re April, 1956 Term Grand Jury*, 7 Cir., 239 F.2d 263.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 14, 1970

# APPENDIX

# APPENDIX

**APPENDIX "A"**

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In the

# United States Court of Appeals

## For the Seventh Circuit

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SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

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No. 17378
UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
JOSEPH S. BUKOWSKI,
*Respondent-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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September 15, 1970

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Before SWYGERT, *Chief Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Respondent appeals from a 3-year sentence for criminal contempt allegedly committed by him while a juror in the case of *United States* v. *Durovic, et al.*, No. 64 CR 668 (N.D. Ill. 1966).

On April 27, 1965, respondent and the other members of the trial jury were sworn for examination upon the voir dire. Between April 28, 1965, and the conclusion of the trial on January 31, 1966, Bukowski and his fellow jurors were ordered and directed by the trial judge to avoid discussing, reading or hearing about the case, either

intentionally or inadvertently. The instructions directed them not to converse among themselves concerning the case, or with outsiders. They were expressly directed to avoid reading newspaper or magazine articles, and were warned concerning radio and television broadcasts. The district judge also admonished any juror obtaining outside information to report that fact to the court immediately. These instructions were given the jury every day, four times a day, during the entire duration of the trial until January 31, 1966.

The *Darcovic* trial concerned allegedly fraudulent practices connected with the sale of the drug Krebiozen. During the course of the trial, an article by Dr. Andrew C. Ivy, a defendant, appeared in the July-August 1965 issue of the "Butcher Workman" magazine published by the Amalgamated Meatcutters and Butcher Workmen of North America. The article was entitled "The Truth That Won't Stay Buried," and the same edition contained an editorial on Krebiozen. Respondent, a member of the executive board of the Chicago Joint Board Amalgamated Meatcutters and Butcher Workers, Fur, Leather and Luggage Division of the publishing organization, allegedly read these items and discussed them with other members of the jury. Similarly, respondent allegedly read and discussed subsequent articles on Krebiozen in the October 1965, November-December 1965, and January 1966 issues of "The Butcher Workman."

In addition to these improprieties, respondent was also charged with attending a convention of the Amalgamated Meatcutters in Springfield, Illinois, during the course of the trial. The minutes of the convention reveal that a speaker favorable to Krebiozen addressed the members, and subsequently a film on the same subject was shown.

The members of the union at that convention entered a resolution calling for a "fair and impartial clinical test of Krebiozen." Respondent allegedly engaged in these activities in contravention of the court's order. At no time did Bukowski report any such activities to the trial judge as instructed.

On December 29, 1967, the United States Attorney for the Northern District of Illinois initiated contempt proceedings against respondent by filing a verified Notice and Petition For Rule To Show Cause with the district judge. The judge issued the Rule to Show Cause to respondent why he should not be held in criminal contempt under 18 U.S.C. § 401(3)[1] for violating judicial orders regarding publicity and conduct of jurors during the Durovic trial.

Respondent filed motions to discharge the Rule to Show Cause in March 1968 which were denied on April 5. Subsequently, respondent unsuccessfully attempted to obtain recusation of the judge. On January 7, 1969, the judge designated the offense as serious and denied a Supplemental Motion to Discharge the Rule to Show Cause. On January 16, 1969, after a jury trial, respondent was

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[1] 18 U.S.C. § 401 provides:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

found guilty, and the judge sentenced him to imprisonment for three years. Respondent appeals from his conviction and sentence.

## I

Respondent first objects to the manner in which criminal contempt proceedings were instituted against him. The procedures followed in initiating this prosecution complied with the specifications of Rule 42(b) of the Federal Rules of Criminal Procedure relating to the disposition of contempts occurring out of the presence of the judge.[2] The processes outlined by that rule include notice and specification of charges. Despite prior approval of the Rule's procedures (*United States* v. *United Mine Workers of America*, 330 U.S. 258, 296; *Yates* v. *United States*, 316 F.2d 718 (10th Cir. 1963)), respondent asserts their insufficiency.

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[2] Rule 42(b) of the Federal Rules of Criminal Procedure states:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing, except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Specifically, respondent contends that the Constitution prohibits imposition of the 3-year sentence without an indictment or presentment of a grand jury. He argues that the Fifth Amendment bars the Government from holding persons "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." A crime is "infamous" for purposes of this protection when it is punishable by imprisonment in a penitentiary. *Mackin* v. *United States*, 117 U.S. 348. Punishment of contempt by the 3-year sentence subjecting respondent to imprisonment in a penitentiary under 18 U.S.C. § 4083 purportedly establishes the conviction as an "infamous crime."

The identical argument was categorically rejected by the Supreme Court in *Green* v. *United States*, 356 U.S. 165, 183-187.[3] The Court refused to interject any independent body into the criminal contempt process which might interfere with or impede judicial disposition of such matters. The majority rested its rejection of the requirements for either grand or petit jury action because of the *sui generis* "general status of contempts under the Constitution, whether subject to 'infamous' punishment or not." 356 U.S. at p. 183. The traditionally summary nature of these proceedings led the Court to conclude:

> "We do not write upon a clean slate. The principle that criminal contempts of court are not required to be tried by a jury under Article III of the Sixth Amendment is firmly rooted in our traditions. Indeed,

[3] Several decisions preceding *Green* either questioned or rejected the characterization of contempt as an "infamous crime." See *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 336; *Gompers* v. *United States*, 233 U.S. 604, 612; cf. *Bloom* v. *Illinois*, 391 U.S. 194, 201, note 3 (apparently citing *Bessette* with approval for its conclusion that contempt could not be considered an infamous crime).

> the petitioners themselves have not contended that they were entitled to a jury trial. By the same token it is clear that criminal contempts, although subject, as we have held, to sentences of imprisonment exceeding one year, need not be prosecuted by indictment under the Fifth Amendment. In various respects, such as the absence of a statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission, criminal contempts have always differed from the usual statutory crime under federal law. As to trial by jury and indictment by grand jury, they possess a unique character under the Constitution." 356 U.S. at p. 187.

Respondent nevertheless asks this Court to depart from that ruling on the basis of more recent decisions of the Supreme Court. Criticism and continued attacks eroded the conclusion of *Green* that jury trials need never be afforded defendants in even serious criminal contempt cases. After forecasting possible reconsideration of the right to jury trial in *United States* v. *Barnett*, 376 U.S. 681, 694-695, the Court exercised its supervisory powers over federal courts to require jury trials of serious contempts. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380. Finally, in *Bloom* v. *Illinois*, 391 U.S. 194, the Court reconsidered and repudiated the rule exempting criminal contempts from constitutional requirements of a jury trial in state cases as well.

In holding that the Constitution requires jury trial in serious criminal contempts, the majority in *Bloom* declined to adhere to reasoning espoused previously in *Green*. Thus the majority in *Bloom* rejected historical practice as dispositive of the constitutional issue. 391 U.S. at p. 200, note 2. The Court also disavowed the conclusion that the judiciary could be trusted "with completely untrammeled power to punish contempt," or that considerations of judicial independence, economy, and

efficiency outweighed the fundamental needs of fairness to safeguard the trial of such contempts from arbitrary governmental actions. 391 U.S. at pp. 207, 208-209.

Though a fundamental departure from prior law, neither *Bloom* nor subsequent decisions of the Supreme Court dealing with serious contempts have expressly overruled the holding of *Green* excepting grand jury indictments in criminal contempts. Moreover, our reading of those decisions fail to disclose inconsistencies or implicit disapproval of that holding which would warrant reconsideration of *Green* by this Court.

No decision has indicated a rejection of the engrained conceptual framework of criminal contempts relied upon by the Court in *Green* as the basis for its ruling. These actions have traditionally been considered a unique, quasi-criminal sanction. As stated in *Myers* v. *United States*, 264 U.S. 95, 104-105:

> "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Accord, *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324; *Blackmer* v. *United States*, 284 U.S. 421, 440; *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (opinion of Justice Clark); see generally, Goldfarb, *The Contempt Power* (1963).

This constitutional distinction between the status of statutorily defined offenses and the judicial power to punish disobedience of court orders has been the doctrinal premise from which analysis of procedural safeguards has proceeded. Consequently, these constitutional "non-crimes" have been tested by the standards of due process rather than under the Fifth and Sixth Amendments' specific strictures governing federal criminal trials of

statutory offenses. Cf. *Levine* v. *United States*, 362 U.S. 610, 616-617; *Blackmer* v. *United States*, 284 U.S. 421, 440; *Cooke* v. *United States*, 267 U.S. 517, 537; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *Gompers* v. *United States*, 233 U.S. 604, 611-613; *Michaelson* v. *United States, ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42, 67. The procedural protections which have gradually surrounded imposition of criminal contempt penalties thus represent the accretions of "fundamental fairness" rather than application of provisions of the Bill of Rights to contempt prosecutions as "crimes."

The extension of the Constitution's guarantee of jury trial to criminal contempt prosecutions is entirely consistent with the continued vitality of that legal fiction. The Supreme Court stated in *Bloom* v. *Illinois*, 391 U.S. 194, 201-202:

> "Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes."

*DeStefano* v. *Woods*, 392 U.S. 631, 632, similarly maintains the distinction between "serious criminal cases" requiring jury trial under *Duncan* v. *Louisiana*, 391 U.S. 145, and "serious criminal contempts" requiring jury trial under *Bloom* v. *Illinois*. Most recently, in *Frank* v. *United States*, 395 U.S. 147, 148, the Court again circumspectly limited its statements to jury trial requirements.

We cannot, therefore, construe the extension of the right to jury trial in serious contempts as signally the abandonment of the doctrine attributing special constitutional status to such proceedings. The Supreme Court

has long recognized the function and practical impact of criminal contempts as well as the formal nature of the distinction between contempts and constitutionally defined "crimes." Still its decisions have uniformly adhered to that analytical construct. We may not depart from it at our choosing.

Nor does the reasoning of the cases relied upon by respondent otherwise persuade us that the holding of *Green* has been impliedly disapproved. The Court in *Bloom* balanced, on the one hand, the fundamental right of the accused to a jury trial as an independent check on arbitrary punishment, against the interests of the judiciary in independent, swift, and economic powers over disobedience.

In this case, indictment by grand jury would provide an additional check by another independent body of men, not against abusive imposition of punishment by an arbitrary judge, but against an undue trial. See *Stirone* v. *United States*, 361 U.S. 212, 217-218; *Smith* v. *United States*, 360 U.S. 1. Though substantial, this right has repeatedly been held outside the ambit of "due process of law." *Hurtado* v. *California*, 110 U.S. 516; see also, *McNulty* v. *California*, 149 U.S. 645; *Hodgson* v. *Vermont*, 168 U.S. 262; *Bolln* v. *Nebraska*, 176 U.S. 83; *Graham* v. *West Virginia*, 224 U.S. 616; *Lem Woon* v. *Oregon*, 229 U.S. 586; *Gaines* v. *Washington*, 277 U.S. 81; *Beck* v. *Washington*, 369 U.S. 541, 545. The recent inclusion of jury trial within the Fourteenth Amendment's Due Process Clause in *Duncan* v. *Louisiana*, 391 U.S. 145, hardly suggests the necessity of reaching the same conclusion with respect to the right to indictment by grand jury. The two specific procedural institutions, their functions, and the interests which they serve, while related, are nonetheless capable of distinction. We can see no basis for anticipating possible re-examination of the

status of the grand jury in the constitutional scheme. Cf. *Morford* v. *Hocker*, 394 F.2d 169 (9th Cir. 1968), certiorari denied, 392 U.S. 944; *Henderson* v. *Cronvich*, 402 F.2d 763 (5th Cir. 1968).

The extension of constitutional right to jury trial in serious contempts does not, moreover, indicate a rejection of the importance of considerations of judicial independence, efficiency and speed. Rather, in *Bloom* the Court recognized the importance of those factors, yet found them outweighed by the fundamental right sought and the otherwise unprotected interests protected by an independent jury. 391 U.S. at p. 209. Provision for trial by jury largely nullifies the need for additional checks upon judicial power to punish contempt. The countervailing values need not be further sacrificed in order to protect the less compelling demand for protection against unfair trial.

Under these circumstances, we adhere to the holding of *Green* v. *United States*, 356 U.S. 165, that indictment by grand jury is not required in criminal contempt proceedings. We are mindful that obedience to the decisions of the Supreme Court may command cautious departure from narrow rulings.[4] Here, however, neither the holding of *Green* nor the reasoning of that decision has been sufficiently eroded to warrant our independent consideration of the merits of respondent's constitutional claim.

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[4] See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726, 731; *United States* v. *White*, 405 F.2d 838, 847-848 (7th Cir. 1969), certiorari granted, 394 U.S. 957; *Rowe* v. *Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), affirmed, 391 U.S. 54; *Tilton* v. *Missouri Pac. RR. Co.*, 306 F.2d 870 (8th Cir. 1962), reversed, 376 U.S. 169; *Browder* v. *Gayle*, 142 F.Supp. 707, 717 (3-judge district court, M.D. Ala. 1956), affirmed per curiam, 352 U.S. 903; see generally Kelman, *The Force of Precedent in the Lower Courts*, 14 Wayne L. Rev. 3 (1967); Note, *The Attitude of Lower Courts to Changing Precedents*, 50 Yale L.J. 1448 (1941).

## II

Respondent next urges that the Notice and Rule to Show Cause did not adequately inform him of the "nature and cause of the accusation" as constitutionally required. See *Cooke* v. *United States*, 267 U.S. 517, 537.

In accordance with the dictates of Rule 42(b) of the Rules of Criminal Procedure, proceedings in this case were instituted by service upon respondent of a copy of the Notice and Petition for Rule to Show Cause as well as the Rule to Show Cause issued by the judge. The Notice and Petition set forth in ample detail the order allegedly violated, the means, time and number of alleged violations; it also requested that Bukowski be held in contempt of court for these actions. The accompanying Rule to Show Cause ordered respondent to appear on the date specified for hearing and further informed him that the offense charged was violation of disobedience of the court's orders. The contents of the two documents clearly satisfied the constitutional requirements of notice as well as the specific processes of Rule 42(b) of the Rules of Criminal Procedure. See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 297-300; *Yates* v. *United States*, 316 F.2d 718 (10th Cir. 1963).

Specifically, respondent asserts that the Notice was insufficient because it failed to specify the grade of the offense charged. Cf. *United States* v. *Gordon*, 253 F.2d 177, 180 (7th Cir. 1958). Strictly speaking, the nature of contempt defies ready classification in terms of "grades" of offenses. Since *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380, however, gradations of criminal contempt have developed as a consequence of the distinctions between "serious" and "petty" offenses drawn for purposes of determining the right to a jury trial. See also *Frank* v. *United States*, 395 U.S. 147. An accused could not, therefore, be subject to serious punishment for criminal con-

tempt without adequate prior information with which to exercise or waive his right to jury trial. Although there was no specification in the Notice or Rule to Show Cause concerning the "seriousness" of this contempt proceeding, the court designated the offense as "serious" and provided a jury trial upon respondent's request. Consequently, we can see no prejudice to respondent's fundamental rights, and no basis for invalidating his trial on that ground. Cf. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 298.

III

Respondent further assails the contempt prosecution in this case as tainted by allegedly improper use of the grand jury to obtain information for contempt proceedings and erroneous application of contempt powers to punish conduct otherwise liable to treatment as a misdemeanor.

Respondent's contention of grand jury abuse is without support in the record and without merit. Although prosecution of criminal contempt may follow from indictment or presentment of the grand jury (see, *e.g.*, *United States* v. *Sternman*, 415 F.2d 1165 (6th Cir. 1969), certiorari denied, 397 U.S. 907; *Carlson* v. *United States*, 209 F.2d 209, 216-218 (1st Cir. 1954)), failure to pursue such course neither constitutes nor suggests impropriety. The grand jury's role as guardian against improper charge or prosecution of "infamous crimes" does not render abusive its inquiry into other federal crimes or prosecutions based upon evidence adduced during proper proceedings. The grand jury holds broad powers of inquiry into any conduct possibly violating federal criminal law. *Hoffman* v. *United States*, 341 U.S. 479, 485; *Sullivan* v. *United States*, 348 U.S. 170, 173; cf. *Homan Mfg. Co.* v. *Russo*, 233 F.2d 547, 551 (7th Cir. 1956); *United States* v. *Neff*, 212 F.2d 297, 301 (3d Cir. 1954). It proceeds

without need of any prior formal charge against any particular individual. *Hale* v. *Henkel*, 201 U.S. 43, 65.

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U.S. 178, 184." *Blair* v. *United States*, 250 U.S 273, 282.

There is no hint in this record that the grand jury was conducting inappropriate investigations or that there was subversion of other policies of the law by utilizing evidence uncovered by that body in this prosecution. That no indictment for contempt was returned or even sought by the Government where none was necessary to prosecution certainly "is no reflection on the integrity of the prosecution." *United States* v. *Procter & Gamble*, 356 U.S. 677, 683.

Equally meritless is the assertion that the Government has improperly employed contempt as a means of circumventing the limits of punishment for conduct such as respondent's under 18 U.S.C. § 1504.[5] Whether or not that

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[5] 18 U.S.C. § 1504 is entitled "Influencing juror by writing" and provides:

> "Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

Section may be applied against those already under judicial orders, such as jurors, its language clearly limits its applicability to communications in writing. Moreover, the prohibition contained in that Section at best covers only a small portion of the allegedly improper conduct attributed to respondent.

## IV

Respondent also urges that his conviction be reversed due to the refusal of the judge to recuse himself. Although no affidavit of bias and prejudice was filed by respondent in support of his motion, he nevertheless contends that the judge should have disqualified himself automatically and that bias and prejudice denied respondent due process. We find the arguments meritless.

The contempt did not charge disrespect to or criticism of the presiding judge requiring disqualification under Rule 42(b) of the Rules of Criminal Procedure, note 2 *supra*. Neither participation in the *Durovic* trial nor the origin nor nature of the contempt proceeding here suggests a need for a separate judge. Cf. *Nilva* v. *United States*, 352 U.S. 385, 396; *Ungar* v. *Sarafite*, 376 U.S. 575, 584-588. Unlike the decisions relied upon by respondent, the trial below was not summary but was held before an impartial jury in a public proceeding. Cf. *In Re Oliver*, 333 U.S. 257; *In Re Murchison*, 349 U.S. 133; *Offutt* v. *United States*, 348 U.S. 11; *Levine* v. *United States*, 362 U.S. 610.

Respondent has failed to present any evidence of prejudice or bias supporting a contention that the trial was not fair. The judge's views regarding the guilt or innocence of defendants in the *Durovic* trial does not support the inference that he brought a jaundiced approach to an entirely different charge against an entirely different individual. His remarks concerning the offense

and character of the defendant, made after return of the verdict by the jury and at the time of sentencing, are similarly inadequate indicia of bias or prejudice. Cf. *United States* v. *Bolden*, 355 F.2d 453, 456 (7th Cir. 1965), certiorari denied, 384 U.S. 1012. Finally, neither the judge's initiation of contempt proceedings, nor his communication of that fact to the jury at the commencement of proceedings supports the conclusion of prejudice or the communication of prejudgment of guilt to the jury.

V

Respondent's next contention is that the evidence failed to prove the allegations of the Rule To Show Cause charging Bukowski with contempt beyond a reasonable doubt. We have reviewed the evidence in the light most favorable to the Government (*Glasser* v. *United States*, 315 U.S. 60, 80), and we conclude that it sufficiently established the charges.

Proof of the allegations relating to the articles which appeared in the "Butcher Workman" came primarily from the testimony of Robert Collins, a reporter for the *St. Louis Post-Dispatch*, the St. Louis, Missouri, newspaper. He testified that on May 4, 1966, approximately 4 months after the conclusion of the *Durovic* trial, he privately interviewed Bukowski. At that time, respondent informed Collins that he had read the articles on Krebiozen which appeared in the "Butcher Workman" during the course of the trial. Bukowski admitted that he knew his actions violated the court's directive. He explained that the magazine came into his home and that he read the articles. He also admitted that he "discussed the articles with other members of the jury,' " specifically, Foreman Adolph Beranek.

Respondent argues that his confession of contemptuous conduct to Collins may not be relied upon to establish

guilt because it lacks adequate independent corroboration. Before considering the accuracy of that assertion, however, we must decide whether the requirement of corroboration of confessions and admissions obtains in criminal contempts as well as statutory crimes.

The rule is well settled in federal criminal law that "conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Wong Sun* v. *United States*, 371 U.S. 471, 488-489. The rule is intended to prevent "errors in convictions based upon untrue confessions alone" (*Warszower* v. *United States*, 312 U.S. 342, 347) by ensuring "police investigations which extend beyond the words of the accused." *Smith* v. *United States*, 348 U.S. 147, 153. Admissions and confessions, persuasive of guilt to a jury, are too frequently unreliable or inconclusive themselves:

> "In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examining." *Opper* v. *United States*, 348 U.S. 84, 89-90.

Considerations akin to the privilege of the accused against self-incrimination and notions of best evidence also support the rule.[6]

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[6] On the rationale and application of the requirement of corroboration generally, see *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 1072-1984 (1966); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U.Pa.L. Rev. 638 (1955).

The requirement that confessions and admissions be corroborated in testing the sufficiency of the evidence supporting convictions should find equal application in cases of criminal contempt. It has long been held that

> "* * * in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 444; see *Bloom* v. *Illinois*, 391 U.S. 194, 204-205.

The conviction that the Government should not declare and punish a crime solely upon the strength of statements of the accused may be considered a facet of proof beyond reasonable doubt in federal courts.[7] Furthermore, the

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[7] The rule's nature, rationale, and history suggest that the requirement states a test of the sufficiency of proof rather than merely an evidentiary rule governing "competence" of a confession or admission. See generally, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 1072-1084 (1966); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638 (1955). Such statements, at least under the federal rules, are "competent" and admissible against the defendant. See *Opper* v. *United States*, 348 U.S. at p. 90; *United States* v. *Calderon*, 348 U.S. 160.

Regardless of the characterization of the rule, it is not clear whether it need be treated as a feature of "Due Process." The Supreme Court has only held that due process of law requires convictions by the standard of proof beyond reasonable doubt. *In re Winship*, 397 U.S. 358. It is not clear to what extent the Constitution's burden of proof of guilt includes observance of federal rules of sufficiency of proof or even fundamental evidentiary law. All individual statements of sufficiency of evidence and evidentiary law need not be swept along as part and parcel of the standard itself. Cf. *Mallory* v. *United States*, 354 U.S. 449; but see, *Brinegar* v. *United States*, 338 U.S. 160, 174. A strong argument from history and policy might well be made that some form of the corroboration rule should be considered binding as an element of "due process" of law. However, we do not rest our conclusion in this case upon any constitutional basis.

standard for proof of guilt assumes the competency of the evidence considered in testing its sufficiency. We see no grounds for departing in contempts from established federal rules regulating the competency of evidence in criminal trial. Cf. *United States* ex rel. *Porter* v. *Kroger Grocery & Baking Co.*, 163 F.2d 168, 172-173 (7th Cir. 1947); *In re Floersheim*, 316 F.2d 423, 426 (9th Cir. 1963). Courts certainly have no interest in punishing nonexistent contempts or convicting accused contemnors upon questionable proof. Efficient and consistent administration of justice, as well as the policies supporting the corroboration requirement, call for its application, at least where serious penalties are at stake and the constitutional right to jury trial attaches. Cf. *Smith* v. *United States*, 348 U.S. 147, 153-154; *Bloom* v. *Illinois*, 391 U.S. 194, 204-205.

The fundamental requirement of corroboration should also apply whether the statements of the accused have allegedy been made to investigating officials or private citizens. The Supreme Court has chosen to give broad scope to both the function and usage of the rule (see *e.g.*, *Opper* v. *United States*, 348 U.S. at pp. 89-92; *Smith* v. *United States*, 348 U.S. at pp. 153-156), and the considerations underlying the requirement are apparent even where the recipient is a private individual.[8] This is especially true where, as here, the statements comprise a complete confession of guilt uttered in strict privacy.

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[8] See *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 1079 (1966). We find this consistent with the suggestion in *Smith* v. *United States*, 348 U.S. at p. 155, note 3 that "[a]dmissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated." The requirement must be flexibly invoked, and should not apply with the same rigor to all statements regardless of the differing content and circumstances of their utterance.

Corroboration in federal courts does not, however, entail independent proof of each element of the offense charged. The purpose of corroboration is to ensure the reliability of the confession or admission of the accused. In *Opper* v. *United States*, 348 U.S. at p. 93, therefore, the Court indicated that the purpose called only for

> "* * * the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. * * * It is sufficient if corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth."

This may be accomplished by evidence directly bearing upon the material matters admitted. Alternatively, the Supreme Court has indicated that "one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." *Smith* v. *United States*, 348 U.S. at p. 156. This may be accomplished by producing substantial evidence of the commission of the crime charged, even though separate corroboration of the specific elements of guilt admitted by the accused is lacking. *United States* v. *Calderon*, 348 U.S. 160, 168-169; cf. *Smith* v. *United States*, 348 U.S. at pp. 158-159.

In the case before us, sufficient circumstantial corroboration of respondent's violation of court orders is present to support the truth of his statements to Collins. The evidence indicated that Bukowski had access to the articles and apparently brought them to the jury room. The magazine "Butcher Workman" is the official publication of the union to which respondent belongs and is sent to its members. During the course of the *Durovic* trial, issues of the magazine on repeated occasions carried stories and editorials favorable to Krebiozen. Juror Frank J. Klyczek

testified that he saw the July-August 1965 issue of the magazine in the jury room. Another juror, Lois Clark, testified that she recognized a page from an article on Krebiozen appearing in the October 1965 issue of the magazine which she believed she saw in the jury room or at lunch.

In addition to these direct suggestions of guilt, Collins' narration of respondent's interview finds incidental corroboration. Collins testified that Bukowski recalled a specific article in the magazine whose substance he related to Collins. Such an article appeared in one issue of the "Butcher Workman." Bukowski informed Collins that he had discussed the articles with Adolph Beranek who was the foreman of the jury at the *Durovic* trial. Beranek himself admitted telling Collins that he "cheated a little in the jury room." Both Collins and Beranek attended a party given by the acquitted defendants shortly after the trial ended.

Lending further credence to the confession, as well as sufficiently supporting an independent violation of judicial orders, is the evidence of respondent's attendance at the union convention during the trial. The Government showed that respondent registered at the same motel at which the union was holding its convention. He was further placed outside the convention chambers by a union member. The clear inference from the evidence is that he attended the convention and participated in its activities, which included a speaker and film on the subject of Krebiozen and the adoption of a pro-Krebiozen resolution.

The final element of proof corroborated respondent's admissions that he failed to inform the district court of his actions. Eugene Bissell, Deputy United States Marshal, who had been assigned to the *Durovic* trial, tes-

tified that Bukowski never informed him of matters concerning the convention or the magazine articles.

This evidence was clearly sufficient to prove respondent's repeated and wilful disregard of the trial court's instructions regarding conduct of jurors. It was, we find, sufficient to warrant an affirmative jury verdict on each charge specified in the Rule To Show Cause.

## VI

The court's instructions to the jury are also assailed as erroneous in two particulars. First, it is claimed that the judge violated Rule 30 of the Federal Rules of Criminal Procedure by instructing the jury in another way than the court had informed the parties it would.[9]

Our review of the colloquy on instructions together with the court's charge to the jury reveals no substantial variance between the information supplied respondent and the actual charge. The court below twice announced that it planned to give the Government's instruction stat-

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[9] Rule 30 of the Federal Rules of Criminal Procedure prescribes:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

ing in the disjunctive the specific contempts charged in the Rule to Show Cause. At the same time, the court indicated that it would make "some changes in the language to conform accurately with the allegations in the petition." The remarks of counsel and the court at that time demonstrate that all concerned were aware that the court had rejected respondent's theory of criminal liability in favor of the substance of the Government's charge. The instruction actually given to the jury did not, in substance, vary from the course indicated by the judge. The variations in language forecast by the judge at the colloquy were minimal and in no way indicated a departure from the theory upon which the Government founded its case. We find no deception of counsel in the court's conduct.

We also reject the contention that the court failed to instruct the jury as to respondent's defense that the directive given jurors in the Durovic trial was unlawful as including a general prohibition on all reading throughout the duration of that prosecution. Even the invalidity of an order need not provide a defense against contempt based upon violation of that order. See *United States* v. *United Mine Workers*, 330 U.S. 258, 293-294; *Walker* v. *City of Birmingham*, 388 U.S. 307. Even assuming the existence of such a defense, however, it would involve a pure question of law whose determination is cognizable by the court and not the jury. See *Sparf and Hanson* v. *United States*, 156 U.S. 51, 102; *Berra* v. *United States*, 351 U.S. 131, 134. Moreover, the asserted defense was utterly without foundation in fact. The judge's orders to the jury were plainly directed only toward information and news relating to the issues then at trial. *Cf. Bird* v. *United States*, 187 U.S. 118; *United States* v. *Bradley*, 426 F.2d 148, 150 (7th Cir. 1970). Finally, the instruc-

tion actually requested failed itself clearly to state the nature of the defense and was substantially duplicated by the court's charge.[10]

## VII

The final objections to the conduct of the trial charge that the court's evidentiary rulings and the conduct of both the prosecutor and the judge deprived respondent of a fair trial.

We find no denial of due process in these matters. The evidentiary rulings involved testimony concerning the reputation of the accused and the meaning of the court's "order" to the jurors of the Durovic trial. The limitations imposed upon respondent's character witnesses were within the discretion of the trial judge under *Michelson* v. *United States*, 335 U.S. 469. Likewise, the court below correctly excluded the evidence offered ostensibly to show that the "order" given to the *Durovic* jurors was not intended as binding. The record discloses that the actual offer involved irrelevant and inconsequential material taken from instructions to an entirely different jury in an entirely different proceeding.

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[10] Respondent's submitted instruction directed the jury:

> "It is the theory of the Respondent that the words spoken by [the judge] to the jurors in the case of *United States* v. *Durovic, et al.*, did not constitute a lawful order and, therefore, the Respondent could not be guilty of contempt. If the jury finds that those words did not constitute a lawful order of the Court, the jury must find the Respondent not guilty."

The court's charge to the jury included among the necessary elements the finding:

> "First, that there was a lawful order of the court which directed the respondent to do or not to do some act or acts."

The alleged misconduct of the judge similarly fails to endure scrutiny. Beyond question, the neutrality of the trial judge is of critical importance to the fairness of a criminal trial. His influence upon the jury is great, and he must carefully guard against prejudicial comments which might create even the appearance of partiality. *United States* v. *Levi*, 177 F.2d 833, 835-836 (7th Cir. 1949); *United States* v. *Carmel*, 267 F.2d 345, 349-350 (7th Cir. 1959); accord, *United States* v. *Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957); *United States* v. *Cassiagnol*, 420 F.2d 868, 878-879 (4th Cir. 1970), certiorari denied, 397 U.S. 1044; *Blumberg* v. *United States*, 222 F.2d 496, 501 (5th Cir. 1955); *United States* v. *Ornstein*, 355 F.2d 222 (6th Cir. 1966); *Young* v. *United States*, 346 F.2d 793 (D.C. Cir. 1965). This principle extends to the relations between the court and counsel. Cf. *United States* v. *Scott*, 257 F.2d 374, 377 (7th Cir. 1958); *United States* v. *Coke*, 339 F.2d 183, 185 (2d Cir. 1964). The allegedly prejudicial conduct in this case, however, consisted of no more than the expression of displeasure by the judge in granting respondent's request for a continuance. These remarks were within the province of the judge in light of his responsibility to conduct an orderly and expeditious proceeding. They disclose no unfairness or partiality against the respondent or his attorney. Cf. *Posey* v. *United States*, 416 F.2d 545, 555 (5th Cir. 1969), certiorari denied 397 U.S. 946; *United States* v. *Gleeson*, 411 F.2d 1091, 1096 (10th Cir. 1969).

Lastly, the prosecutor's brief closing argument remark about demonstrations falls far short of creating an atmosphere of prejudice imperiling dispassionate judgment by the jury. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 240; *United States* v. *Freeman*, 167 F.2d 786, 791 (7th Cir. 1948), certiorari denied, 335 U.S.

817; *United States* v. *Ramos*, 268 F.2d 878, 880 (2d Cir. 1959). At most, it amounted to irrelevant oratory, harmless to this trial. Cf. *United States* v. *Fidanzi*, 411 F. 2d 1361, 1362 (7th Cir. 1969), certiorari denied, 396 U.S. 929; *United States* v. *Hoffman*, 415 F.2d 14, 21 (7th Cir. 1969), certiorari denied, 396 U.S. 958.

## VIII

Having reviewed the determination of respondent's guilt, we turn to consider the propriety of the 3-year sentence imposed by the district judge. Punishment of criminal contempt should reflect the "least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231. Appellate courts bar "special responsibility" for preventing abuse of the contempt power, and this Court has the power in appropriate circumstances to revise sentences inflicted upon contemnors whether trial has been by judge or jury. *Green* v. *United States*, 356 U.S. 165, 188; *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States ex rel. Robson* v. *Malone*, 412 F.2d 848 (7th Cir. 1969); *Schnurman* v. *United States*, 379 F.2d 92 (D.C. Cir. 1967); *United States* v. *Conole*, 365 F.2d 306 (3rd Cir. 1966), certiorari denied, 385 U.S. 1025. Pertinent to this inquiry are

> "the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future." *United States* v. *United Mine Workers of America*, 330 U.S. at p. 303.

The range of conduct set forth in the Petition for Rule to Show Cause certainly stated flagrant disregard of re-

peated judicial orders regarding most sensitive and important matters which would warrant harsh punishment.[11] On the other hand, we conclude that imprisonment for 18 months adequately punishes such conduct and that a greater sentence would be excessive. Cf. *United States* ex rel. *Robson* v. *Malone*, 412 F.2d 848 (7th Cir. 1969).

The judgment of conviction is affirmed as modified.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[11] Cf. 18 U.S.C. § 1503 which prescribes punishments of up to $5,000 fine and five years' imprisonment for analogous misconduct.

## APPENDIX "B"

**UNITED STATES COURT OF APPEALS**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

**Thursday, October 15, 1970**

**Before**

**Hon. LUTHER M. SWYGERT, *Chief Judge***
**Hon. THOMAS E. FAIRCHILD, *Circuit Judge***
**Hon. WALTER J. CUMMINGS, *Circuit Judge***

**No. 17378**
**United States Of America,**

***Plaintiff-Appellee,***

**vs.**

**Joseph S. Bukowski,**

***Defendant-Appellant.***

**Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.**

**It Is Ordered by the Court that the petition for rehearing filed in the above-entitled case be and the same is hereby denied.**

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 968

JOSEPH BUKOWSKI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner was a member of the jury selected in the United States District Court for the Northern District of Illinois in the case of *United States* v. *Durovic*, which involved charges of fraudulent practices in the sale of Krebiozen. During that trial the jurors were repeatedly directed to refrain from reading written material about the case, to avoid discussing it among themselves or with others, and to inform the court immediately if some matter connected with the case came to their attention from an outside source.

On December 29, 1967, the United States Attorney filed a verified petition for a rule to show cause why



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petitioner should not be held guilty of contempt for violations of these orders. The petition stated that, while sitting as a juror, petitioner read articles about Krebiozen printed in his union's publication "The Butcher Workman", attended a convention at which a proponent of Krebiozen spoke, discussed the articles and proceedings with other members of the jury and failed to bring these facts to the attention of the court. The rule to show cause was issued by the same judge who had presided at the *Durovic* trial. After a jury trial before that judge, petitioner was convicted and sentenced to imprisonment for three years.

The court of appeals affirmed the conviction but reduced the sentence to eighteen months. Its thorough opinion sets forth in detail the evidence on which the conviction rests and discusses, with one exception, each of the numerous contentions raised by petitioner in that court and reiterated here.

The only issue not dealt with below is the contention that the trial court's instruction, requiring any juror exposed to publicity to "report the matter to me," sought to compel petitioner to give evidence against himself in violation of the Fifth Amendment. Citing *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, petitioner contends that his failure to inform the judge could not serve as part of the basis for a finding of contempt. (Pet. 20–25.) However, this point was never raised in the courts below.[1] Petitioner's failure to in-

[1] See *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

voke the Fifth Amendment in a timely fashion cannot be excused on the basis set forth in *Grosso*, 390 U.S. at 70–72, because both his response to and trial on the contempt charges occurred well after *Marchetti* and *Grosso* were decided.

Moreover, there is no substance to the self-incrimination argument in this context. If petitioner's exposure to publicity about Krebiozen was inadvertent, disclosing this to the judge would not have been incriminating. And it makes no sense to say that a juror who inadvertently becomes exposed to publicity must tell the judge but one who intentionally exposes himself need not. In either situation the integrity of the trial process and fairness to the parties requires that the court be made aware of any threat to jury impartiality. Since jurors would not be expected to violate a judge's orders, the instruction here was not aimed at one "inherently suspect of criminal activities," 390 U.S. at 68, and does not fall within the ambit of *Marchetti* and *Grosso*.

Petitioner's other contentions are answered in the opinion of the court of appeals. Of course, with respect to the claim that the prosecution should have been instituted by indictment, this Court is not bound by the holding in *Green* v. *United States*, 356 U.S. 165, 183–187, to the same extent as the court of appeals considered itself bound. Nevertheless, for the reasons set forth in the opinion below, there is, we suggest no reason to reconsider the *Green* ruling. While the decisions in *Bloom* v. *Illinois*, 391 U.S. 194, and *Cheff* v. *Schnackenberg*, 384 U.S. 373, as-

similated criminal contempt to ordinary crimes for the purpose of adjudicating whether punishment of more than six months could be imposed, criminal contempt does, for constitutional purposes, remain *sui generis* because of its intimate relationship to the proper functioning of the judicial process. Since such a prosecution involves the inherent power of courts to enforce their orders, it is proper that a court make the initial determination whether there is probable cause to believe that its orders have been violated.

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

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